NO. 50474-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANDREW FORREST,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

Kitsap County Cause No. 15-1-01324-4

The Honorable William C Houser, Judge

BRIEF OF APPELLANT

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15. The sentencing court entered convictions for both Count I and Count II in violation of the Wash. Const. art. I, § 9 protection against double jeopardy.
16. Counts I and II are identical for double jeopardy purposes.
17. Mr. Forrest's case must be remanded for vacation of his conviction in Count II.

ISSUE 7: The constitutional prohibition against double jeopardy prohibits entry of convictions for two offenses that are "identical both in law and in fact." Did the trial court err by entering convictions for both counts of vehicular homicide in Mr. Forrest's case when the two charges were identical under the "same elements test" and the judge acknowledged that they merge for double jeopardy purposes at sentencing?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Andrew Forrest was driving at night from rugby practice to the Navy barracks where he lived. Ex. 79A, p. 4. He encountered a motorcycle on the highway and the two vehicles paced each other for several miles, going about seventy miles per hour.[1] Ex 79A, p. 3; Ex. 103; RP 136.[2]

At one point when Mr. Forrest was driving behind the motorcycle in the left lane, another car came from behind and started tailgating Mr. Forrest. Ex. 79A, p. 3; Ex. 103. Mr. Forrest moved over to the right lane and passed the motorcycle. Ex. 79A, p. 3; Ex. 103; RP 136. The other car followed Mr. Forrest to the right lane, and then switched back to the left lane and passed him. Ex. 79A, p. 3; Ex. 103.

Mr. Forrest started approaching a slower-moving car in the right lane, so he turned on his turn signal and prepared to move back to the left lane. Ex. 79A, p. 3-4; Ex. 103; RP 136. He did not see the motorcycle when he looked, so he switched lanes. Ex. 79A, p. 3; Ex. 103. As soon as he did so, he felt the motorcycle hit the rear portion of his car. Ex. 79A, p. 3; Ex. 103.

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[1] The speed limit on the highway was sixty miles per hour. RP 611.

[2] Unless otherwise noted, all citations to the transcript refer to the consecutively-numbered volumes spanning 5/1/17 through 5/15/17.

Mr. Forrest pulled over and called 911. Ex. 79A, p. 3. At the scene, he told the officers that the motorcycle had accelerated suddenly right before the collision, causing it to hit the car. Ex. 103; RP 137.

Jared Knight, who had been driving the motorcycle, died from his injuries. RP 317.

Mr. Forrest's car sustained relatively minor damage to the left rear quarter panel. RP 402-04.

About a month later, the state charged Mr. Forrest with vehicular homicide. RP 530. The state charged him with two counts for the accident, alleging that he had caused Mr. Knights death either by driving recklessly or, in the alternative, by driving with disregard for the safety of others. CP 50-51.

At trial, police witnesses testified that Mr. Knight's motorcycle had skidded for about seventy-five feet before the collision. RP 458. Once the motorcycle went down, it caused gouging in the surface of the road and furrowing in the dirt before impacting the guardrail between the two directions of traffic. RP 459. After that, the motorcycle switched directions, crossing both lanes of traffic on one side of the highway and coming to rest on the shoulder. RP 411.

Two eyewitnesses told the police that they saw Mr. Forrest pass Mr. Knight's motorcycle before they lost lost sight of the two vehicles as they went around a turn, shortly before the accident. RP 644-45.

One of the witnesses also said that he heard the motorcycle make a revving sound right before the collision. RP 174.

Even so, the state's accident reconstructionist, Detective Green, concluded that Mr. Forrest ran into Mr. Knight from the side as he tried to pass him. RP 571. He said that Mr. Green was using an "evasive lane steer" to go around the slower car in the right lane when he collided with Mr. Knight's motorcycle. RP 573. Green opined that Mr. Forrest and Mr. Knight had been going approximately the same speed when Mr. Knight slammed on his brakes. RP 573.

Green admitted on cross-examination that he did nothing to account for the motorcycle's collision with the guardrail in his calculations to determine its speed. RP 622.

Green also told the jury that he suspected that Mr. Forrest may have known the driver of the car that had been tailgating him. RP 514. He said that Mr. Forrest was a member of online clubs for "Fast-and-the-Furious-type cars…souped up cars. That kind of culture." RP 512-13.

Based on Mr. Forrest's online memberships, Green told the jury that he disbelieved Mr. Forrest's inability to identify the make or model of

the car, even though he gave the police a detailed description of the car. RP 512-14, 636. Green testified that he suspected that Mr. Forrest actually knew the driver of the car that had been tailgating him and was not being honest with the police. RP 512-14.

Defense counsel did not object to any of Green's testimony about Mr. Forrest's online activity or about his opinions of whether Mr. Forrest was being truthful. RP 512-14.

Green also told the jury that he arrested Mr. Forrest based on probable cause. RP 530. He said that he believed that probable cause existed because the lay witnesses had given stories that were consistent with one another. RP 530. Green described at length the extent to which the lay witnesses' reports lined up. RP 530-31. He said that he concluded that the witness statements supported the idea that Mr. Forrest had been driving with disregard for the safety of others and had been driving recklessly. RP 531.

Mr. Forrest's defense attorney did not object to any of this testimony. RP 530-31.

Two eyewitnesses to the incident perceived the interaction between Mr. Forrest's car and the tailgating car to be the two of them "jockeying for position" or "chasing" one another. RP 151-55. A third witness said that the two cars were going faster than the motorcycle but that she did not

think much of it. RP 199. She did not say anything about them chasing each other or jockeying for position. RP 198-204.

Mr. Forrest also called an accident reconstruction expert, Steve Harbinson, to testify. RP 650-54. Harbinson concluded that Mr. Knight had suddenly accelerated at the same time that Mr. Forrest changed lanes, causing his motorcycle to hit Mr. Forrest's car. RP 674.

Harbinson pointed out that the damage to Mr. Forrest's car could only be explained by the motorcycle hitting Mr. Forrest's car, not by Mr. Forrest hitting the motorcycle from the side. RP 675.

Finally, Harbinson concluded that Green had underestimated the motorcycle's speed because he used the wrong formula for Mr. Forrest's lane change and failed to account for the motorcycle's impact with the guardrail or the friction caused by its sliding in the dirt. RP 656-60.

The state's theory in closing was that Mr. Forrest had been driving recklessly by "racing" the other car and weaving in and out of lanes, which caused the accident. RP 752-55.

The prosecutor ended her argument by admonishing the jury to hold Mr. Forrest accountable:

> The defendant does not get to shrug his shoulders and point the blame at Mr. Knight. Outrageous. He does not get to do that. He has to be held accountable for the choices that he made. The choice he made to completely ignore the risk to Mr. Knight on the road that night.

RP 803-04.

Defense counsel's theory in closing was that Mr. Forrest was not the proximate cause of Mr. Knight's death because Mr. Knight's sudden acceleration actually caused the accident. RP 782.

But Mr. Forrest's defense attorney did not propose the standard jury instruction regarding intervening or superseding events in vehicular homicide cases. *See* CP *generally*; *See* RP *generally*. As a result, the jury was not instructed that Mr. Forrest was not criminally liable if an unforeseen action by Mr. Knight had also been a proximate cause of his death. CP 57-75.

The jury found Mr. Forrest guilty of both counts of vehicular homicide. CP 76.

Without any discussion at the sentencing hearing, the judge checked the box on Mr. Forrest's Judgment and Sentence authorizing forfeiture of all seized property. Felony Judgment and Sentence, pp. 7-8, Supplemental Designation of Clerk's Papers.

The court ordered at sentencing that the two counts merged because only one crime had occurred and that Mr. Forrest would only be sentenced on count I, because it was the more serious charge. RP (5/26/17) 32-33.

Nonetheless, the court entered convictions for both charges of vehicular homicide on Mr. Forrest's Judgment and Sentence.. Felony Judgment and Sentence, p. 1, Supplemental Designation of Clerk's Papers.

This timely appeal follows. CP 77.

ARGUMENT

I. MR. FORREST RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).[3]

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel's deficient performance if there is a reasonable probability[4] that counsel's mistakes affected the outcome of the proceedings. *Id.*

[3] Ineffective assistance of counsel claims are reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

[4] A "reasonable probability" under the prejudice standard is lower than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, "it is a probability sufficient to undermine confidence in the outcome." *Id.*; *see also Jones*, 183 Wn.2d at 339.

Here, Mr. Forrest's defense attorney provided ineffective assistance of counsel by failing to propose a jury instruction necessary to the defense and by failing to object to extensive inadmissible evidence without any valid tactical reason.

A. Mr. Forrest's defense attorney provided ineffective assistance of counsel by failing to propose a jury instruction informing the jury that Mr. Forrest was not criminally liable if Mr. Knight's sudden acceleration was an intervening event, causing his death.

In order to convict Mr. Forrest of vehicular homicide, the state was required to prove beyond a reasonable doubt that his actions were the proximate cause of Mr. Knight's death. RCW 46.61.520(1).

To that end, defense counsel called an expert witness whose accident reconstruction supported Mr. Forrest's statements that the collision happened because Mr. Knight suddenly accelerated and hit the rear of Mr. Forrest's car. RP 674-75.

If the jury believed this defense theory, then Mr. Knight's acceleration would have been an intervening or superseding cause, meaning that Mr. Forrest's actions were not the proximate cause of the accident. *State v. Souther*, 100 Wn. App. 701, 708, 998 P.2d 350 (2000); *State v. McAllister*, 60 Wn. App. 654, 661, 806 P.2d 772 (1991), *overruled on other grounds by State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005).

But Mr. Forrest's defense attorney failed to propose a jury instruction informing the jury of the legal significance of Mr. Knight's acceleration. *See* CP *generally*; *See* RP *generally*. Accordingly, even if the jury believed Mr. Forrest's version of events, they likely also believed that they were obligated to convict him anyway. *See* CP 57-75. Mr. Forrest's attorney provided ineffective assistance of counsel.

Defense counsel provides ineffective assistance by failing to propose a jury instruction necessary to his/her client's defense. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009). A defense attorney also provides unreasonable representation by failing to research the law relevant to the case. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The bounds of proximate cause are different -- and narrower -- in criminal cases than in tort cases in. *State v. Bauer*, 180 Wn.2d 929, 940, 329 P.3d 67 (2014). This is because of the "extreme penalties" attached to criminal cases and the different rationales underlying criminal and tort law. *Id*. at 937.

Contributory negligence by the deceased (or by a third party) is not a defense to vehicular homicide. *Souther*, 100 Wn. App. at 708. However, actions by the deceased (or by a third party) my break the causal chain if they constitute a superseding or intervening event, without which

the actions of the accused would not have caused an accident. *Id.*at 709; *See also McAllister,* 60 Wn. App. 654.

Because such an intervening event would negate the element of proximate cause, the burden is on the state to prove beyond a reasonable doubt that such an event did not supersede the accused's actions. *See State v. W.R., Jr.,* 181 Wn.2d 757, 336 P.3d 1134 (2014); *See also* Comment to WPIC 25.03.

There is a pattern jury instruction designed to make this rule clear to the jury in a vehicular homicide case, which reads:

> If you are satisfied beyond a reasonable doubt that the acts of the defendant were a proximate cause of the death, it is not a defense that the conduct of the deceased may also have been a proximate cause of the death, except as described below.
>
> If a proximate cause of the death was a new independent intervening act of the deceased which the defendant, in the exercise of ordinary care, should not reasonably have anticipated as likely to happen, the defendant's acts are superseded by the intervening cause and are not a proximate cause of the death. An intervening cause is an action that actively operates to produce harm to another after the defendant's act have been committed or begun.

WPIC 25.03 (some bracketed material omitted).

Here, the entire theory of Mr. Forrest's defense was that Mr. Knight's sudden acceleration was an intervening or superseding event, which Mr. Forrest could not have anticipated. Indeed, defense counsel called an expert witness to establish exactly that. RP 650-75. But Mr.

Forrest's attorney failed to propose WPIC 25.03, which was necessary to give legal significance to those facts.

Absent the instruction on intervening acts, the jury in Mr. Forrest's case was left only with the instruction defining probable cause, which informed them that he was guilty so long as Mr. Knight's death would not have happened absent Mr. Forrest's conduct, regardless of any action on the part of Mr. Knight. CP 73. Without WPIC 25.03, none of the defense evidence had any legal significance to the jury.

Mr. Forrest's defense attorney provided ineffective assistance of counsel by failing to propose an instruction that was critical to the defense. *Powell*, 150 Wn. App. at 156*; Kyllo*, 166 Wn.2d at 862.

There is a reasonable probability that defense counsel's deficient performance affected the outcome of Mr. Forrest's trial. *Jones*, 183 Wn.2d at 339. Indeed, the jury could have believed the defense expert's theory that Mr. Knight's sudden acceleration caused him to hit Mr. Forrest's car, but they would also have thought that they were obligated to convict Mr. Forrest anyway (based on the instructions they were given) if they also believed that he had been driving recklessly. *See* CP 57-75. Mr. Forrest was prejudiced by his attorney's failure to propose the jury instruction on intervening or superseding acts by the deceased. *Id.*

Defense counsel provided ineffective assistance by failing to propose WPIC 25.03, which was necessary to the defense. *Powell*, 150 Wn. App. at 156. Mr. Forrest's conviction must be reversed. *Id.*

B. Mr. Forrest's defense attorney provided ineffective assistance of counsel by failing to object to inadmissible evidence that prejudiced the defense.

Defense counsel provides ineffective assistance by waiving objection to inadmissible evidence that prejudices his/her client, absent a valid tactical reason. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007), *aff'd*, 165 Wn.2d 474, 198 P.3d 1029 (2009).

1. Defense counsel provided ineffective assistance by failing to object to testimony that Mr. Forrest was a member of an online club for "Fast-and-the-Furious-type cars," which encouraged the jury to convict based on an improper propensity inference.

The evidence that Mr. Forrest associated with an online club for "Fast-and-the-Furious-type cars"[5] was inadmissible because it was protected by the First Amendment freedom of association, encouraged the jury to make an improper propensity inference, and had virtually no probative value but carried a very high risk of unfair prejudice.

[5] *The Fast and the Furious* is a blockbuster movie franchise about an illegal "underground racing world." *The Fast and the Furious*, IMDb. http://www.imdb.com/title/tt0232500 (last visited Jan. 19, 2018); *See also* http://www.fastandfurious.com/about (last visited Jan 19, 2018).

Even so, defense counsel did nothing to have the evidence excluded. Mr. Forrest's attorney provided ineffective assistance of counsel.

Because it is protected by the First Amendment guarantee of freedom of association, evidence of membership in a social club is not admissible in a criminal trial unless there is some connection between the crime and the organization. *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009) (*citing Dawson v. Delaware*, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992)); U.S. Const. Amend. I. Such evidence is not admissible when offered merely to prove the associations of the accused. *Id.*

Here, the online car club of which Mr. Forrest is a member was not connected to the accident in any way. Accordingly, his association with the club is protected by the First Amendment and was not admissible as evidence of his guilt. *Scott*, 151 Wn. App. at 526.

Additionally, under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b) must be read in conjunction with ER 403, which requires that probative value be balanced

against the danger of unfair prejudice.[6] *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The proponent of the evidence carries the burden of establishing that it is offered for a proper purpose. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014).

Before admitting misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Slocum*, 183 Wn. App. at 448.

The court must conduct this inquiry on the record. *McCreven*, 170 Wn. App. at 458. Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008). If the evidence is admitted,

[6] ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

the court must give a limiting instruction to the jury. *Gunderson*, 181 Wn.2d at 923.

For example, evidence that the accused is a member of a gang is generally inadmissible under ER 404(b) and ER 403. *State v. Mee*, 168 Wn. App. 144, 159, 275 P.3d 1192 (2012); *Scott*, 151 Wn. App. at 526. This is because gang membership evidence is not usually relevant to prove any element of an offense but invites the jury to make the "forbidden inference" that the accused is more likely guilty because s/he is a "criminal-type" person with a propensity to commit crimes. *Mee*, 168 Wn. App. at 159 (*quoting State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)); *See also Scott*, 151 Wn. App. at 529 ("Without a connection of that status to the crimes, the only reasonable inference for the jury to draw from the testimony [regarding gang membership] was that Mr. Scott was a bad person").

Similarly, the evidence that Mr. Forrest was a member of an online club that may have encouraged illegal racing was not relevant to prove any element of vehicular homicide but strongly encouraged the jury to draw an impermissible propensity inference. As with gang membership, the only reasonable purpose of the evidence to the jury was likely that it demonstrated that Mr. Forrest was interested in illegal car racing so he

must have been engaging in illegal car racing on the night of the accident.[7] *See Scott*, 151 Wn. App. at 529.

Mr. Forrest's defense attorney provided deficient performance by failing to object to the inadmissible evidence that he was a member of a "Fast-and-the-Furious-type" club. *Hendrickson*, 138 Wn. App. at 833. Counsel had no valid tactical reason for waiving objection to the inadmissible evidence.

There is a reasonable probability that defense counsel's unreasonable failure to object affected the outcome of Mr. Forrest's trial. The state's entire theory was that Mr. Forrest had been driving recklessly and in disregard for the safety of others because he had been racing another car down the highway. RP 752-55. The evidence that he was a member of an online club seeking to emulate the illegal behavior in *The Fast and the Furious* encouraged the jury to make an improper propensity inference that directly supported that theory. Mr. Forrest was prejudiced by his attorney's deficient performance. *Jones*, 183 Wn.2d at 339.

[7] The detective referred to Mr. Forrest's club membership to argue that he should have been able to identify the make and model of the car that had been tailgating him. RP 512-14. First, as argued below, this testimony constituted an improper comment on Mr. Forrest's veracity. Second, the detective could have made that argument by simply saying that Mr. Forrest's online activity demonstrates that he knows a lot about cars, without discussing activities protected by the freedom of association or referring to *The Fast and the Furious*.

Mr. Forrest's defense attorney provided ineffective assistance of counsel by unreasonably failing to object to evidence that Mr. Forrest was a member of an online club for "Fast-and-the-Furious-type" cars. *Id.*; *Hendrickson*, 138 Wn. App. at 833. Mr. Forrest's conviction must be reversed. *Id.*

2. Mr. Forrest's defense attorney provided ineffective assistance of counsel by failing to object to improper officer testimony, which offered an opinion of the veracity of Mr. Forrest and of the state's lay witnesses.

Detective Green told the jury that – based on Mr. Forrest's online membership in a "Fast-and-the-Furious-type" car club, he suspected that Mr. Forrest was not being truthful when he said that he did not know the make and model of the car that had been tailgating him. RP 512-14. Based on this opinion, Green speculated to the jury that Mr. Forrest also knew the driver of that car, which he denied to the police. RP 512-14.

Shortly thereafter, Green informed the jury that he believed the eyewitness accounts of the events established probable cause to arrest Mr. Forrest because they were consistent with each other. RP 530. Then he described those consistencies at length and told the jury that he believed the eyewitness' statements established that Mr. Forrest had been driving recklessly and had disregarded the safety of others. RP 531.

None of this evidence was admissible: it all constituted improper opinion testimony regarding the veracity of the accused or of another witness. *State v. Kirkman*, 159 Wn.2d 918, 927–28, 155 P.3d 125 (2007). But Mr. Forrest's attorney did not object to any of it. RP 512-14; 530-31. Defense counsel provided ineffective assistance.

No witness may offer testimony providing an opinion of the veracity of the accused or of any other witness. *Id.* Such testimony improperly invades the exclusive province of the jury. *Id.*

Improper opinion testimony from a law enforcement officer regarding another witness's veracity can be particularly prejudicial because it "carries a special aura of reliability." *Id*. at 928-29.

Courts apply a five-factor test to determine whether a statement qualifies as improper opinion testimony, looking to: (1) "the type of witness involved, (2) the nature of the testimony, (3) the nature of the charge, (4) the type of defense, and (5) the other evidence before the jury. *Id.* at 928 (*citing State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

As to the first factor, Green's status as a law enforcement officer and as the lead detective on the case gave his testimony a "special aura of reliability," making it more likely that the jury would lend more credence

to his assessment of the veracity of the other witnesses than to their own. *Kirkman*, 159 Wn.2d at 928-29.

Turning to the second factor, the nature of Green's testimony directly accused Mr. Forrest of being dishonest about whether he knew the make, model, and driver of the car that had been tailgating him. RP 512-14. This was a critical issue in the case because it spoke directly to whether Mr. Forrest and the other car had been racing on the highway.

Shortly thereafter, Green provided contrasting testimony opining that the stories eyewitnesses who thought Mr. Forrest had been driving unsafely were consistent with one another and were sufficient to establish probable cause of his guilt. RP 530-31. Green went on to explain why he felt that way and even went so far as to tell the jury that he believed that specific elements of the charges against Mr. Forrest had been proved. RP 531.

Analogously, in the prosecutorial misconduct context, an argument to the jury pointing out that probable cause has already been established in a case is tantamount to an opinion of guilt because it implies that the accused's guilt has already been determined. *See State v. Stith*, 71 Wn. App. 14, 22, 856 P.2d 415 (1993). Likewise, here, Green's extensive testimony about the determination of probable cause and its basis constituted an opinion of Mr. Forrest's guilt. *Id.*

As to factors four and five, the nature of the charge against Mr. Forrest and the nature of his defense made his case a matter of his word against the what two of the eyewitnesses thought they saw. Green's testimony opining that Mr. Forrest was lying but that the eyewitnesses who believed he had been driving unsafely were credible went right to the heart of this primary factual issue.

Finally, under the fifth factor, Mr. Forrest exercised his right not to testify at trial. Accordingly, the jury did not have an independent opportunity to assess his credibility and likely lent extra weight to Green's opinion that he had been lying.

Green provided improper opinion testimony on the veracity of Mr. Forrest and of the lay witnesses for the state. *Kirkman*, 159 Wn.2d at 928-29.

But Mr. Forrest's defense attorney failed to object to any of the inadmissible opinion evidence. RP 512-514; 530-31. Defense counsel had no valid tactical reason for waiving objection. Defense counsel provided deficient performance. *Hendrickson*, 138 Wn. App. at 833.

There is a substantial probability that defense counsel's unreasonable failure to object affected the outcome of Mr. Forrest's trial. As detailed above, Green's improper opinion testimony placed the "aura of reliability" of the primary detective on the case behind the opinion that

Mr. Forrest was lying and the lay witnesses who thought he had been driving unsafely were telling the truth. *Kirkman*, 159 Wn.2d at 928-29. Green's testimony that the witness accounts were sufficient to establish probable cause also encouraged the jury to conclude that Mr. Forrest's guilt had already been established. *See Stith*, 71 Wn. App. at 22. Mr. Forrest was prejudiced by his attorney's deficient performance. *Jones*, 183 Wn.2d at 339.

Mr. Forrest's defense attorney provided ineffective assistance of counsel by failing to object to highly prejudicial, inadmissible officer opinion evidence. *Kirkman*, 159 Wn.2d at 927-29; *Jones*, 183 Wn.2d at 339; *Hendrickson*, 138 Wn. App. at 833. Mr. Forrest's conviction must be reversed. *Id.*

II. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT BY ADMONISHING THE JURY TO HOLD MR. FORREST ACCOUNTABLE, RATHER THAN TO HOLD THE STATE TO ITS BURDEN OF PROOF.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if

they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Even absent objection, reversal is required when misconduct is "so flagrant and ill intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

At Mr. Forrest's trial, the prosecutor committed misconduct during closing argument by misstating the law to the jury and encouraging the jury to hold Mr. Forrest "accountable," rather than to hold the state to its burden of proof.

A prosecutor commits misconduct by arguing that the jury should "hold [the accused] accountable" for his alleged misdeeds. *State v. Neal*,

361 N.J. Super. 522, 537, 836 A.2d 723 (App. Div. 2003).[8] Such arguments are akin to asking the jury to send a message, and thus "improperly divert jurors' attention from the facts of the case." *Id.*

In Mr. Forrest's case, the prosecutor ended her closing argument by encouraging the jury to hold Mr. Forrest accountable and told the jury not to permit him to "shrug his shoulders and point the blame at Mr. Knight." RP 803-04. This argument was improper because it misstated the jury's role, which is to dispassionately weigh the evidence and to hold the state to its burden of proof. *Neal*, 361 N.J. Super. at 537; *Perez-Mejia*, 134 Wn. App. at 917.

There is a substantial likelihood that the prosecutor's improper argument affected the verdict at Mr. Forrest's trial. Because he exercised his right to remain silent at trial, Mr. Forrest's defense hinged on the jury's proper application of the presumption of innocence. But the prosecutor's improper argument diverted the jury from its duty to hold the state to its burden, focusing instead on Mr. Forrest's purported attempt to "shrug his shoulders" and the state's desire to hold him accountable. Mr. Forrest was prejudiced by the prosecutor's improper argument. *Glasmann*, 175 Wn.2d at 704.

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[8] Prosecutorial admonitions for the jury to convict the defendant in order to "send a message" have long been held to constitute misconduct in Washington. *See e.g. State v. Perez-Mejia*, 134 Wn. App. 907, 917, 143 P.3d 838 (2006).

Arguments with an "inflammatory effect on the jury" are generally not curable by an instruction. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). Accordingly, the prosecutor's improper argument was also flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 704.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by admonishing the jury to find Mr. Forrest guilty in order to hold him accountable. *Id.*; *Neal*, 361 N.J. Super. at 537; *Perez-Mejia*, 134 Wn. App. at 917. Mr. Forrest's conviction must be reversed. *Id.*

III. THE CUMULATIVE EFFECT OF THE ERRORS IN MR. FORREST'S CASE DEPRIVED HIM OF A FAIR TRIAL.

Under the doctrine of cumulative error, an appellate court may reverse a conviction when "the combined effect of errors during trial effectively denied the defendant [his/]her right to a fair trial even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010).

In Mr. Forrest's case, defense counsel's ineffective assistance, which left the jury without critical instruction and capitulated to the improper admission of highly prejudicial evidence, in combination with the prosecutor's improper argument encouraging the jury to hold him accountable worked in tandem to strongly encourage the jury to find guilt based on Mr. Forrest's alleged propensity for driving recklessly. The

errors also created a significant likelihood that the jury convicted Mr. Forrest on an improper basis – such as a desire to hold him to account or lack of information on the applicable law – even if the jurors believed Mr. Forrest's exculpatory version of events.

The cumulative effect of the errors at Mr. Forrest's trial deprived him of a fair trial and requires reversal of his conviction for vehicular homicide. *Id.*

IV. THE SENTENCING COURT EXCEEDED ITS STATUTORY AUTHORITY AND VIOLATED MR. FORREST'S RIGHT TO DUE PROCESS BY ORDERING FORFEITURE OF HIS PROPERTY.

As a result, a trial court has no authority to order forfeiture unless there is a specific statute authorizing that order. *State v. Roberts*, 185 Wn. App. 94, 339 P.3d 995 (2014); *State v. Alaway*, 64 Wn. App. 796, 800-801, 828 P.2d 591, *review denied*, 119 Wn.2d 1016 (1992). Importantly, this is true even when a defendant is accused of a crime. There is no "inherent authority to order the forfeiture of property used in the commission of a crime." *Alaway*, 64 Wn. App. at 800-801. It is only with statutory authority and after following the procedures in the authorizing statute that the government may take property by way of forfeiture. *Id.; see also Espinoza v. City of Everett*, 87 Wn. App. 857, 866, 943 P.2d 387 (1997), *review denied*, 134 Wn.2d 1016 (1998).

Here, the matter was not discussed at sentencing, but the trial court nonetheless imposed forfeiture by checking a box on Mr. Forrest's Judgment and Sentence authorizing forfeiture of all seized property. Felony Judgment and Sentence, pp. 7-8, Supplemental Designation of Clerk's Papers. With this order, the sentencing court authorized government forfeiture of a citizen's property without due process or any legal authority for such an exertion of power.

Roberts, is directly on point. In *Roberts*, the sentencing court wrote on the judgment and sentence, "[f]orfeit any items seized by law enforcement," as a condition of sentencing. *Roberts,* 185 Wn. App. at 96. This Court rejected the prosecution's efforts to argue that there was any authority for such an order of forfeiture simply based on the conviction, instead holding that there was no statutory or inherent authority authorizing government forfeiture of items as a condition of sentencing. *Id.* at 95-96.

The *Roberts* Court also rejected the idea that a defendant must somehow make a motion for the return of property or meet some other burden in order to challenge the unlawful condition of sentencing authorizing immediate forfeiture of property. *Id.* at 96.

Additionally, any confiscation of property that is authorized by statute must, nonetheless, be forfeited pursuant to the proper statutory procedures. *Alaway*, 64 Wn. App. at 799.

The Legislature has carefully crafted such procedures and has included protections against governmental abuse of the authority of taking away the property of a citizen. *See, e.g.,* RCW 10.105.010 (law enforcement may seize certain items to forfeit but must serve notice and offer a hearing, etc.); RCW 69.50.505 (controlled substance forfeitures requiring notice, an opportunity to heard, a right of removal, a civil proceeding etc.); *Smith v. Mount*, 45 Wn. App. 623, 726 P.2d 474, *review denied*, 107 Wn.2d 1016 (1986) (upholding the constitutionality and propriety of having the chief officer presiding over a proceeding where his agency stands to financially benefit if he finds against the citizen).

Further, many forfeiture statutes again vest the authority for such proceedings in the law enforcement agencies or executive branch, not the court, as well, and further require certain procedures to be followed to establish, *in separate civil proceedings*, that property should be forfeited as a result of its relation to a crime. *See* RCW 9A.83.030 (money laundering; attorney general or county prosecutor file a separate civil action in order to initiate those proceedings, etc.); RCW 9.46.231 (gambling laws: 15 day notice, etc.).

No statute or rule provides any authority for a sentencing court to order forfeiture of the property of a defendant seized by police based solely upon his criminal conviction for vehicular homicide. Nor do the statutes authorize such a forfeiture without any due process which is both constitutionally and legislatively required. *See, e.g., Alaway,* 64 Wn. App. at 798 (rejecting the idea that the sentencing court had "inherent power to order how property used in criminal activity should be disposed of"); U.S. Const. Amends. VI, XIV.

Accordingly, there can be no question that forfeiture proceedings are prohibited unless statutorily authorized. RCW 9.92.110 specifically abolished the doctrine of forfeiture by conviction. That statute provides, in relevant part, "[a] conviction of [a] crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein." *Id*. Accordingly, here the trial court erred by assuming that it had authority to order the forfeiture based upon the criminal conviction. RCW 9.92.110. Under RCW 9.92.110, the mere fact that the defendant was convicted of a crime is not sufficient to support an order of forfeiture. *Id*.

The sentencing court in Mr. Forrest's case exceeded its authority by imposing forfeiture. This Court should strike the forfeiture condition.

V. THE TRIAL COURT ERRED BY ENTERING CONVICTIONS FOR BOTH COUNTS OF VEHICULAR HOMICIDE BASED ON A SINGLE OFFENSE, IN VIOLATION OF MR. FORREST'S CONSTITUTIONAL RIGHT TO REMAIN FREE FROM DOUBLE JEOPARDY.

Both the state and federal constitutions protect against double jeopardy for a single offense. *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); *State v. Womac*, 160 Wn.2d 643, 650, 160 P.3d 40 (2007); U.S. Const. Amend. V; art. I, § 9.

The constitutional guarantee against double jeopardy prohibits entry of two convictions for a single offense. *Turner*, 169 Wn.2d at 454; *Womac*, 160 Wn.2d at 650. Rather, when the state charges two or more counts for a single offense and the jury finds the accused guilty of more than one, the trial court must vacate the lesser convictions in order to comply with double jeopardy. *Turner*, 169 Wn.2d at 454; *Womac*, 160 Wn.2d at 650.

Two offenses are constitutionally identical if they are "identical both in fact and in law." *Womac,* 160 Wn.2d at 652. Washington applies the "same evidence test," under which two offenses are the same for double jeopardy purposes if proof of one offense would necessarily prove the other. *Id.*

Here, Mr. Forrest's convictions for Count I (vehicular homicide under the recklessness prong) and Count II (vehicular homicide under the

prong for disregard for the safety of others) are the same for double jeopardy purposes. *Id.* Because evidence that Mr. Forrest had driven recklessly was also sufficient to prove that he had driven with disregard for the safety of others, the two charges are "identical both in fact and in law." *Womac*, 160 Wn.2d at 652.

Indeed, the judge in Mr. Forrest's case acknowledged at sentencing that his two convictions merged for double jeopardy purposes. RP (5/26/17) 32-33. Even so, the court entered convictions for both counts on Mr. Forrest's Judgment and Sentence. Felony Judgment and Sentence, p. 1, Supplemental Designation of Clerk's Papers.

The trial court violated Mr. Forrest's constitutional right to remain free of double jeopardy by failing to vacate his conviction for Count II (the lesser charge). *Turner*, 169 Wn.2d at 454; *Womac*, 160 Wn.2d at 650. Mr. Forrest's case must be remanded for correction of his Judgment and Sentence. *Id.*

CONCLUSION

Mr. Forrest's defense attorney provided ineffective assistance of counsel by failing to request a jury instruction necessary to the defense and by failing to object to improper opinion evidence and inadmissible evidence that he was in an "fast-and-the-furious-type" car club online.

The prosecutor committed misconduct by encouraging the jury to hold Mr. Forrest accountable rather than to hold the state to its burden of proof. Mr. Forrest's convictions must be reversed.

In the alternative, the sentencing court exceeded its statutory authority and violated Mr. Forrest's right to due process by ordering forfeiture of his property. This Court should strike the forfeiture condition of Mr. Forrest's Judgment and Sentence.

In the alternative, This Court should remand Mr. Forrest's case and order the trial court to vacate Mr. Forrest's conviction for Count II, which was entered in violation of the constitutional prohibition against double jeopardy.

Respectfully submitted on January 24, 2018,

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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Andrew Forrest/DOC#399615
Monroe Correctional Complex-WSR
PO Box 777
Monroe, WA 98272

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney
kcpa@co.kitsap.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on January 24, 2018.

_____

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LAW OFFICE OF SKYLAR BRETT

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